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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

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No. 269.

HIGINIO ROMEU, APPELLANT,

vs.

ROBERT H. TODD.

BRIEF FOR APPELLEE.

N. B. K. PETTINGILL,
Counsel for Appellee.

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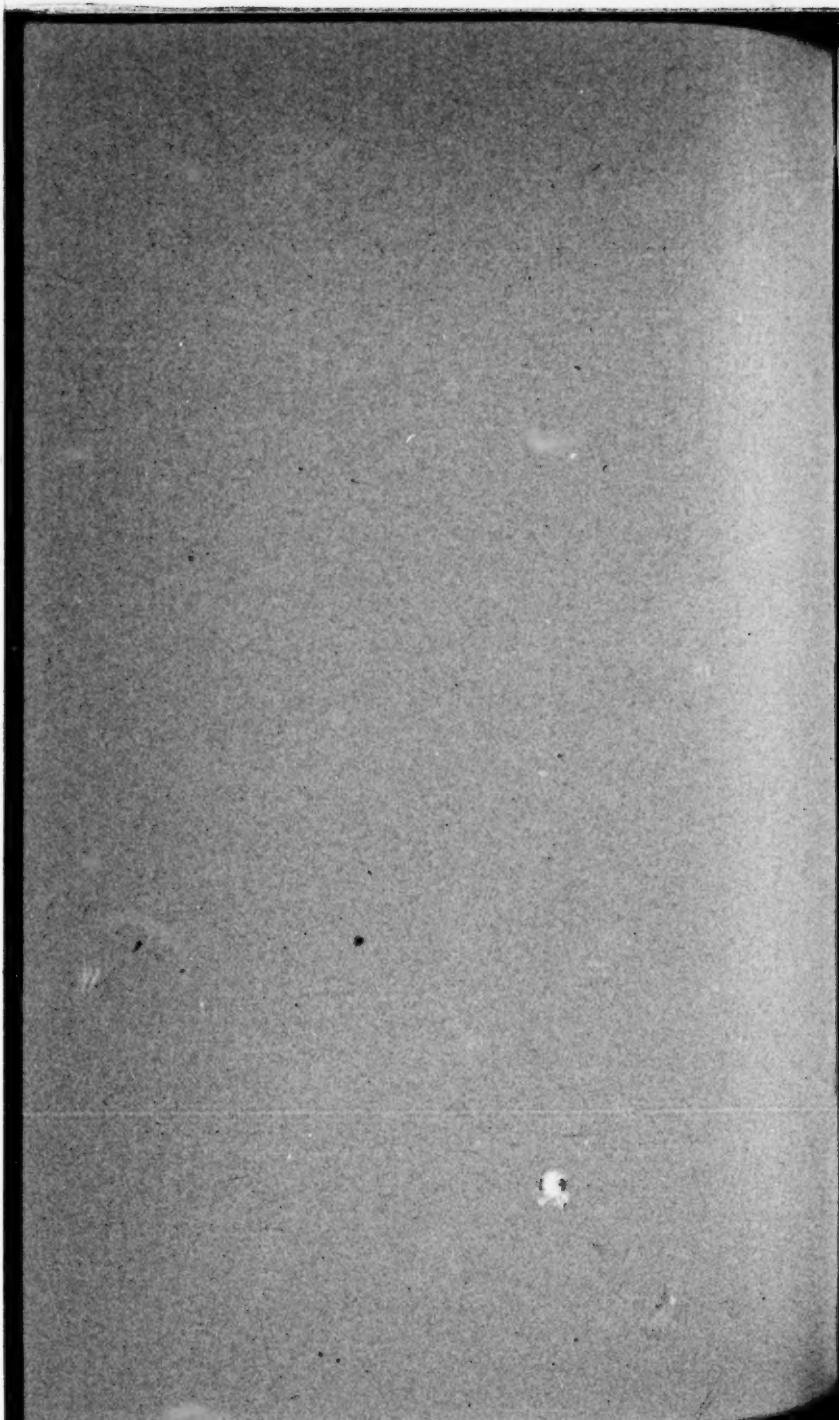

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BRIEF FOR APPELLEE.

This case comes up on appeal from the final decree of the District Court of the United States for Porto Rico. The brief for appellant contains a fairly correct statement of the facts shown by the record, which counsel for appellee is willing to adopt in all important respects. If any slight variances appear, attention will be called to them in the course of the argument. One inaccuracy, which occurs both in the allegations of the bill of complaint shown in the record and in the statement of facts by counsel, is the description of the bill of complaint in the original suit of Todd *vs.* Agostini as a creditors' bill, while it was in fact a bill to subject the real estate in question to the lien of a particular judgment obtained by Todd. But this is perhaps immaterial, as both pleading and statement admit that, in the bill of complaint in said original suit, the tract of land now in controversy was "specifically de ibed," and the doctrine of *lis pendens* would equally apply.

ARGUMENT.

If a litigation pending in any court of the United States within the States had taken the same course as that herein involved, and the same question now brought before the court on this appeal had come from a Federal court in any one of the States, we think there can be no question how it would be decided, because there seems to have been a uniform line of decisions from early times as to the application of the equitable doctrine of *lis pendens*, which, as we understand it, is entirely distinct from the statutory *lis pendens* which is provided for in many States in suits at law.

While the court is undoubtedly familiar with the general principles underlying this doctrine and with the general trend of the decisions in which it has been applied, we beg the indulgence of the court for quoting some paragraphs from leading cases which seem to have special application to the case at bar, as well as the statement of the underlying principle by Mr. Pomeroy in his work on Equity Jurisprudence:

> "It has been stated in numerous judicial opinions, and the same view has been repeated by text-writers, that the rule concerning the effect of *lis pendens* is wholly referable to the general doctrine of constructive notice. It has been said that a pending suit in equity operates as a constructive notice to the world, and that a purchaser *pendente lite* is bound by the final result of the litigation, because he is charged with such a notice of the proceeding, entirely irrespective of any information which he may or may not have had. Courts of the highest ability and authority have, however, adopted a somewhat different theory. According to this view, it is not correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the courts often so described its operation. It affects him, not because it amounts to notice, but because the law does not allow litigant parties to give

to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the court in the suit should be binding, not only on litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end. * * * It must not be supposed that this mode of explanation affects in the slightest degree the settled rules concerning *lis pendens*, or alters the rights and liabilities of alienees from a party to a suit during its pendency.

"If we adopt this *rationale* of the rule as correct, the general rule may be accurately formulated as follows: During the pendency of an equitable suit, neither party to the litigation can alienate the property in dispute, so as to affect the rights of his opponent. This brief proposition in reality contains the entire doctrine. Adopting, however, the ordinary mode of explanation which regards the effect of *lis pendens* as merely a particular instance of constructive notice, 'the general and established rule is,' using the language carefully chosen by Chancellor Kent in a leading case, 'that a *lis pendens*—a pending suit in equity—duly prosecuted, and not collusive, is notice to a purchaser of the property in dispute from a party to the litigation, so as to affect and bind his interests by the decree; and the *lis pendens* begins from the service of the subpœna after the bill is filed.'"

Pomeroy's Equity Jurisprudence, secs. 632, 633.

In the leading case decided by Chancellor Kent, above referred to, early in the last century, the following statement is made (after discussing the question of notice):

"But it will not be necessary to rest the cause on this ground. The other point which has been pressed for consideration appears to be altogether conclusive.

Admitting that Ballou had no knowledge, in fact, of the suit of Mrs. Green against Winter, when he made the purchase, he is nevertheless chargeable with legal or constructive notice so as to render his purchase subject to the event of that suit. The established rule is that a *lis pendens,* duly prosecuted and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree; and the *lis pendens* begins from the service of the subpœna after the bill is filed.

"The counsel for the defendant have made loud complaints of the injustice of this rule, but the complaint was not properly addressed to me; for, if it is a well settled rule, I am bound to apply it, and it is not in my power to dispense with it. I have no doubt the rule will sometimes operate with hardship upon a purchaser without actual notice; but this seems to be one of the cases in which private mischief must yield to general convenience; and, most probably, the necessity of such a hard application of the rule will not arise in one out of a thousand instances. On the other hand, we may be assured the rule would not have existed, and have been supported for centuries, if it had not been founded in great public utility. Without it, as has been observed in some of the cases, a man, upon the service of a subpœna, might alienate his land and prevent the justice of the court. * * *

"I have said that *lis pendens* was of itself notice to the purchaser, and it will now be proper to show that this rule is well established in our law. It is no more than an adoption of the rule in a real action at common law, where, if the defendant aliens after the pendency of the writ, the judgment in the real action will overreach such alienation. It was one of the ordinances of Lord Bacon, laid down for the better and more regular administration of justice in the court of chancery, that 'no decree bindeth any that cometh in *bona fide*, by conveyance from the defendant, before the bill exhibited, and is made no party either by bill or order; but where he comes in *pendente lite,* and while the suit is in full prosecution, and without any color of allowance or privity of the court, there regularly the decree bindeth' (Bacon's Works, vol. 4, page 511). Here we find the rule de-

clared above two centuries ago and by the highest authority to which we can appeal; and it will appear to have received support and application down to this day" (reviewing many cases).

Murray *vs.* Ballou, 1 Johnson's Chan., 566.

"In County of Warren *vs.* Marcy, 97 U. S., 96, it was said to be a general rule that 'all persons dealing with property are bound to take notice of a suit pending with regard to the title thereto, and will, on their peril, purchase the same from any of the parties to the suit!' While this rule was said not to apply to negotiable securities, purchased before maturity, nor to articles of ordinary commerce sold in the usual way, it was held to be applicable to cases relating to land. And in support of this view was cited the case of Murray *vs.* Ballou, 1 John. Ch., 566, in which Chancellor Kent laid it down as an established rule that [here follows quotation as above]. Here the So. Inland Navigation & Improvement Co. accepted a conveyance of the lands in question from the trustees of the Int. Imp. Fund, after service of the subpœna, and a copy of the injunction, upon the trustees, its grantors. That company, therefore, took its titles *pendente lite*, and its mortgagee, the Union Trust Company, was bound by the final decree rendered in the case to the same extent that it is bound."

Union Trust Co. *vs.* Southern, etc., Co., 130 U. S., 565.

"We have considered the case just as if the present suit had been brought by Hill. The appellants have no greater right than he would have, if the present suit had been instituted by him; for Mellen, the trustee for Boyd, acquired his rights *pendente lite*. Hill sold and conveyed to him after he had been personally served with copies of the order to appear and plead, answer or demur to the original and supplemental bills, and only three days before the time fixed for his appearance to the original suit. His sale was more than three months after he was required to appear, and plead, answer or demur to the cross-bill. That sale and conveyance could not affect the power

of the court to proceed to a final decree, so far as his interest in the property was concerned. Nor by such sale and conveyance did Mellen and his *cestui que trust* acquire any absolute right to become a party to the suit instituted by the Furnace Company. Purchasers of property involved in a pending suit may be admitted as parties, in the discretion of the court; but they cannot demand, as of absolute right, to be made parties, nor can they complain if they are compelled to abide by whatever decree the court may render, within the limit of its power, in respect to the interest their vendor had in the property purchased by them *pendente lite*" (citing authorities). "As said by Sir William Grant, in Bishop of Winchester *vs.* Paine, 11 Vesey, 194, 'the litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them, it is as if no such title existed. Otherwise such suits would be interminable; or, which would be the same in effect, it would be in the pleasure of one party at what period the suit should be determined.'"

Mellen *vs.* Moline Iron Works, 131 U. S., 352.

Other cases to the like effect are the following, to which might be added many more:

Murray *vs.* Lylburn, 2 John. Ch., 441.
County of Warren *vs.* Marcy, 97 U. S., 105.
Miller *vs.* Sherry, 2 Wall., 237.
Terrell *vs.* Allison, 21 Wall., 289.
Lacassagne *vs.* Chapuis, 144 U. S., 119.

II.

While the appellant does not directly controvert the foregoing principle and authorities quoted, his counsel attempts to avoid them by claiming that they are not applicable in Porto Rico on account of the different system of laws prevailing there, and makes extensive quotations from the mortgage law, which is one of the special laws recognized and left in force by Congress when it enacted the civil government

act for Porto Rico in April, 1900 (31 Stats. at Large, 77). But, by section 34 of the same act, Congress established a Federal judicial district in Porto Rico and conferred thereby the following powers:

> "The district court for said district shall be called the District Court of the United States for Porto Rico and shall have power to appoint all necessary officials and assistants, including a clerk, an interpreter, and such commissioners as may be necessary, who shall have like power and duties as are exercised and performed by commissioners of the circuit courts of the United States, and shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court."

As we have always understood, and as we believe Congress intended, this is a grant of full equity powers to the United States court established thereby; otherwise it could not have "jurisdiction of all cases cognizant in the circuit courts," nor could it "proceed therein in the same manner as a circuit court." This provision has always been by that court interpreted as such a grant of power, and further, as a requirement to maintain the distinction between the law and equity sides of the court and the pleading and procedure to be followed on each side, and that interpretation has had the tacit approval of this court, by its consideration and decision of cases purely equitable in their nature, in Rodriguez *vs.* Vivoni, 201 U. S., 371, and Garrosi *vs.* Dastas, at the present term.

It may be true that the engrafting of an equitable jurisdiction on the laws of Porto Rico constituted a departure from the system of law formerly prevailing there, but it does not follow that such departure was not a beneficent exercise of the power of the new sovereign. In any event, it seems to us such was the intention of the Congress and an evi-

dence of its desire to give to the new territory, by bestowing upon it the dual system of courts existing in the States, all the advantages for the most perfect administration of justice. If the people of Porto Rico were unacquainted with equitable rights and remedies, no one will contend that it was otherwise than beneficial to the people as a whole to have such remedies placed within their reach; but we need look no farther than the plain intent of the Congress, expressed in the above act. If that gave, as we believe it did, full equity powers to the District Court of the United States for Porto Rico, that court was at liberty to exercise those powers to the same extent and in the same manner as a circuit court of the United States in any one of the States, and the pendency of a suit in equity in said court must have in all respects the same effect as in the same court of the States. As was said by this court in a leading case:

> "The equity jurisdiction of the courts of the United States is derived from the Constitution and laws of the United States. Their powers and rules of decision are the same in all the States. Their practice is regulated by themselves, and by rules established by the Supreme Court. This court is invested by law with authority to make such rules. In all these respects they are unaffected by State legislation."
>
> Noonan *vs.* Braley, 2 Black, 499.

Also, as was said by Mr. Justice Harlan, after citing the language of a decision as to the application of a statute of limitation in an action based upon a fraud:

> "They are peculiarly applicable to a local statute which, if followed, would impair the power of the courts of the United States to enforce the settled principles of equity in suits of which they have, by the Constitution and laws of the United States, full jurisdiction. While the courts of the Union are required by the statutes creating them to accept as rules of decision, in trials at common law, the laws of the

several States, except where the Constitution, laws, treaties and statutes of the United States otherwise provide, their jurisdiction in equity cannot be impaired by the local statutes of the different States in which they sit."

Kirby *vs.* Lake Shore R. R. Co., 120 U. S., 130.

Many other decisions might be cited to the like effect. It, then, only remains to be determined whether the doctrine of *lis pendens* and its effects are necessary ingredients of the jurisdiction of a court of equity. This question is easily decided by the arguments advanced in the first cases cited in this brief. If a litigant is to enjoy the full benefits of the equity jurisdiction and processes—the same in one State as another, the same in the Territory as in the State—he must be equally protected as to the results of his suit if he wins. If the doctrine of *lis pendens* is proper and necessary to the protection of the rights of a litigant in an equity court in a State, it is equally so to the same litigant in the Territory; and if this court has not the same power to enforce its decree as against a purchaser *pendente lite* as the circuit court of the United States in a State, it cannot "proceed therein in the same manner as a circuit court," as the above-cited law of Congress provides.

III.

The main contention of appellant, however, seems to be that even courts of equity of the United States in a State are bound by the statutory provisions for recording a *lis pendens* when such provision has been enacted in such State. But in this contention counsel fail to distinguish between cases at law and cases in equity, and an investigation of the cases cited will show that they are cases upon the law side of the court.

The case of Vance *vs.* Wesley, 85 Fed. Rep., cited on page

19 of appellant's brief, is a case at law, because it is based on the Code of Civil Procedure of South Carolina.

The case of Smith *vs.* Gale, 144 U. S., 509, which is cited on page 13 of brief of appellant, came up from the Supreme Court of the Territory of Dakota, having been instituted in the fourth district of the Territory of Dakota in 1882, under the Civil Code of Procedure of 1877, then in force in the Territory.

This Code (p. 509, §3) "excludes" the "common law," (p. 514, §33), abolishes all distinction between actions at law and suits in equity, and provides (p. 526, §101) for the filing of notice of *lis pendens,* and that—

> "From the time of filing *only* shall the pendency of the actions *be constructive notice* to the purchaser or encumbrancer of the property affected thereby * * * an action shall be deemed to be pending from the time of the filing of such notice." (Italics supplied.)

The only other decision of this court cited on behalf of appellant, Bondurant *vs.* Watson, 103 U. S., is clearly not in point. We have no quarrel with the proposition there laid down, that a rule of property established by decisions of the highest court of the State are binding on the Federal courts of the same State; but we most earnestly urge that we are, in the case at bar, not dealing with a rule of property, but with a principle of equity jurisdiction and procedure. There is every difference between the question whether an equity court shall properly protect the litigants before it and the question whether a mortgage shall be valid or invalid because not recorded. The whole argument of counsel for appellant goes off on the proposition that the mortgage law must be complied with, while his own quotations from that law show that it concerns itself solely with questions of registration of *conveyances or liens* affecting real property—and that this suit did not involve either of those matters, we shall argue in the subsequent subdivision of this brief. We shall content ourselves now with citing a few cases upon the

present proposition, that State or Territorial recording or registry laws have nothing to do with the validity of equitable *lis pendens* and its effects.

The case of Lacassagne *vs.* Chaupis, 144 U. S., 119, hereinbefore cited, is an instructive case upon the doctrine of *lis pendens,* and particularly so because it came up from Louisiana, where the civil law prevails, and where, as counsel says on page 18 of his brief, there is great similiarity to the mortgage law of Porto Rico. There Lacassagne and one Maxwell had a recorded mortgage against certain property, and a certain widow, Cavé, brought an equity suit against one Cavailhez, claiming title to the same property; but nothing was recorded touching the pendency of said suit. This court afterward declared on that appeal that said suit of the widow Cavé was fraudulent and the court was without jurisdiction; yet it was said that the pendency of it was notice to all the world, and that even *bona fide* mortgagees could not acquire rights in said property pending said suit without becoming parties to it. And the court winds up the discussion with the general statement that—

> "It is well settled, in regard to land, that, when a suit is pending in regard to it, a person who purchases under the defendant *pendente lite* is subject to the operation of a writ of possession if one is finally issued on a judgment in the suit."

The same conclusion has also been reached, and very pertinent language used, by a State court of high standing in a decision where the facts completely covered those of the case at bar, and we therefore beg the indulgence of the court in quoting therefrom:

> "The suit to foreclose the mortgage was commenced in the United States Circuit Court of the proper district on the 8th day of July, 1884, and the appearance of the defendants duly entered on the same day. That suit,which was regularly and continuously prosecuted, resulted in a decree of foreclosure, rendered on the 13th day of January, 1886, under which all

the property was sold, and the sale confirmed June 22, 1886. The purchasers afterward received their deed for the property and conveyed it to defendant company in due form. * * * The plaintiff below, and the several cross-petitioners, except Fox, recovered their judgments against the railroad company after the commencement and during the pendency of the foreclosure suit, and none of them were made parties thereto. * * * It is claimed by the defendants in error that all these judgment creditors except Fox are bound by the decree in the foreclosure suit. * * * That the court in that suit had jurisdiction of the parties, and of the property included in the mortgage, is not questioned; nor is it that the prosecution of the suit was close and continuous; and it is well settled that all persons who, in such case, purchase or otherwise acquire an interest in the subject of the litigation, take with constructive notice of the pendency of the suit, and will be bound by its results though not made a party. * * * The rule is founded in necessity, as well as upon public policy, as, without it, the judgment of the court could in all cases be frustrated, or rendered ineffectual, by conveyance or incumbrance made or suffered during the pendency of the suit; new suits would then become necessary against those so obtaining an interest in the subject of the action, who might, in the same way, compel still further suits, and so on, until there would be no end to the litigation. * * * It is contended, however, by counsel for the plaintiff in error that section 5056 of the Revised Statutes (of Ohio) forbids the application of the rule in this case and prevents the foreclosure suit brought in the United States court from operating as a *lis pendens*, affecting the liens of the judgments recovered in Huron county. That section provides that 'when any part of real property, the subject-matter of an action, is situated in any county or counties other than one in which the action is brought a certified copy of the judgment in such action must be recorded in the recorder's office of such other county or counties, before it shall operate therein as notice so as to charge third persons, as provided in the preceding section; but it shall operate

as such notice without record in the county where it is rendered; but this section shall not apply to actions or proceedings under any statute which does not require such record.' * * * These sections belong to the Code of Civil Procedure, and it is obvious they relate to actions brought and judgments rendered in the State courts, and not to those in the courts of the United States. * * * Similar statutes have received like construction elsewhere. A statute of the State of Virginia provided that 'no *lis pendens* or attachment against the estate of a non-resident shall bind or affect a purchaser of real estate without actual notice thereof, unless and until a memorandum setting forth the title of the cause, the general object thereof, the court in which it is pending, a description of the land and the name of the person whose estate is intended to be affected thereby, shall be left with the clerk of the court of the county or corporation in which the land is situated, who shall forthwith record the said memorandum in the deed book and index the memorandum by the name of the person aforesaid.' When that statute was in force, an assignee in bankruptcy brought suit in the Federal court at Richmond, to set aside as fraudulent a deed for certain real property in Petersburg. Pending the suit, a third person in good faith purchased the property from a defendant, and paid full value for it, without notice of the fraud or pending suit. The court held he took nothing by his purchase as against the decree in the Federal court, notwithstanding no *lis pendens* was filed or recorded as required by the Virginia statute (Rutherglen *vs.* Wolfe, 1 Hughes, 78). In the case of Wilson *vs.* Hefflin, 81 Ind., 35, it appeared that during the pendency of a suit in the Federal court to reform a mortgage so as to embrace a tract of land not described in it, and to foreclose the mortgage, when so reformed, Wilson purchased the land, which was situated in a county where the Federal court did not sit, and where, upon the records, the title was in the name of his grantor, and no incumbrance of the land appeared of record. His purchase was made in good faith, for value, and without actual notice of the mistake in the mortgage, or the pen-

dency of the suit to reform and foreclose it. Subsequently the court decreed reformation of the mortgage and sale of the property. In an action brought by Wilson, who was in possession of the land, to quiet his title as against the decree of the Federal court, he relied on the statute of Indiana which had not been complied with, similar in its provisions with that of Virginia, heretofore mentioned; but the court decided against him, holding that the statute had 'no effect upon suits in the United States courts.' And in Major *vs.* Cowell, 51 Cal., 478, it was held that the clause of the Practice act of that State 'relating to the filing of a *lis pendens* does not apply to suitors except in the State courts.'

"It follows that the judgments recovered against the defendant railroad company while the suit was pending in the Federal court to foreclose the mortgage embracing the property which it is sought to subject to their payment, created no lien, nor gave any right or remedy to those creditors which can now be enforced or made effectual against the property."

Stewart *vs.* Lake Erie, etc., R. R. Co. (Ohio), 29 L. R. A., 438.

We believe no further argument is needed than that contained in the foregoing opinion to make absolutely clear the logic of our position and to show that the precedents are consonant therewith.

IV.

There only remains to be explained away the misapprehension of counsel for appellant as to the purpose and result of the original suit of Todd *vs.* Agostini. The bill of complaint in that case did not pray for the rescission or cancellation of any mortgage or conveyance; it merely prayed that the defendant Merle might be decreed to hold the title of the property in question as a trustee for Agostini, the latter having furnished the money with which it was bought, and that title might be held to be subject to the lien of the Todd judgment. The decree naturally was, first, that Agostini

should pay the amount of the judgment, and, second, and only in case such amount was not paid, that the title held by defendant Merle in trust should be sold to satisfy the judgment lien. It is true that the *result* of the decree might have been to change the title of the property, but that was not the purpose of the bill. So, also, as regards the rights of Romeu. The application of the doctrine of *lis pendens* does not rescind or annul the conveyance from Merle to Romeu, as between the parties. Romeu has as good title to the property as Merle had to give; he merely takes it subject to the same lien. So all the various provisions of the mortgage law referred to by counsel for appellant simply have no application to the case.

Indeed, the commentator relied upon by counsel does not go far enough to avail him. The quotation made from the work of Galindo and Escosura, at the bottom of page 7 and top of page 8 of his brief, is fatal to his contention, because it is there plainly said that the cautionary notice allowed by the mortgage law does not even cover "the case of a suit for the ownership of an interest in real estate," but is limited to "him who sues for the ownership of real property, or the creation, declaration, modification, or extinction of a property right." The above analysis of the character of the suit is sufficient to show that it came within neither of the described classes; hence counsel are claiming that we should have done what the law did not permit us to do, much less require of us. The commentator says it ought to have been provided for and was not. If that be true, another reason is added why the appellant cannot rely upon his alleged search of the registry, because he was looking for something which had no place there.

V.

The principle of *lis pendens* resulting from the bringing of an equity suit involving real estate specifically described in the bill is thus seen to be inseparable from the exercise of

the equity jurisdiction and necessary for the orderly conduct and prompt termination of litigation; otherwise it would be a race to see which could first reach the registry of property, the complainant, with his notice to be filed, or the defendant, with his conveyance in fraud of his opponent. Its necessity is independent of time, place, or circumstance, and its application, in the words of Chancellor Kent, "one of the cases in which private mischief must yield to general convenience."

We therefore submit that our demurrer to the bill of appellant in the court below was rightfully sustained and the bill dismissed, and we respectfully ask that this appeal be also disallowed and the decree of the court below affirmed.

Respectfully submitted,

N. B. K. PETTINGILL,
Counsel for Appellee.